ARBITRATING CORRUPTION

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ABSTRACT

One of the most controversial issues in international investment law is how arbitral panels should deal with investments tainted by corruption at their inception. The current practice of investment arbitrators is to refuse to hear investors' claims when bribery allegations are substantiated. A recent wave of scholarship has attacked this "corruption defense," arguing that the practice unfairly harms investors and encourages governments to maintain corrupt practices. This Essay responds to that scholarship, arguing that the current approach is the best policy choice on balance. The Essay analyzes three core policy questions at the heart of the debate: Would eliminating the corruption defense lead governments to adopt meaningful anti-corruption reform? Does corrupt foreign investment improve economic and political conditions in the host states to a sufficient degree to warrant investment protection? Do the governments establishing investment treaties that set the contractual terms between states want investment protections for corrupt investment? In answering all three questions in the negative and placing the issue within the broader context of transnational anti-corruption law, this Essay provides the theoretical foundation necessary for supporting the current practice.

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INTRODUCTION

Consider the following cases:

- Siemens secured a public contract to produce national identity cards in Argentina by bribing public officials. Argentina later terminates the contract due to an economic crisis. Siemens brings an arbitration claim against Argentina under a bilateral investment treaty (BIT) arguing that Argentina expropriated its investment. The arbitral body awards Siemens over $217 million before the company's corrupt payments come to light.[1] Siemens later pleads guilty to two counts of violating the Foreign Corrupt Practices Act in this and other contractual relationships, and Siemens does not seek enforcement of the arbitral award against Argentina.[2]

- Metal-Tech, an Israeli company, invests in a joint-venture with two state-owned enterprises in Uzbekistan. Uzbeki officials later bring criminal proceedings against the joint venture and terminate its rights to purchase raw materials and export its products. As a result, the joint venture is forced into bankruptcy and liquidated.[3] Metal-Tech brings a claim under an international investment law treaty, but

1. Siemens AG v. Argentine Republic, ICSID Case No. ARB/02/8, Award, ¶ 403 (Feb. 6, 2007), 14 ICSID Rep. 513 (2009); *see also* Michael A. Losco, Note, *Streamlining the Corruption Defense: A Proposed Framework for FCPA-ICSID Interaction*, 63 DUKE L.J. 1201, 1201–03 (2014).

2. *See* Losco, *supra* note 1, at 1201–03.

3. Tamar Meshel, Metal-Tech Ltd. v. Republic of Uzbekistan – *Is Really No One Getting Punished?*, KLUWER ARB. BLOG (Jan. 3, 2014), https://arbitrationblog.kluwerarbitration.com/2014/01/03/metal-tech-ltd-v-republic-of-uzbekistan-is-really-no-one-getting-punished/ [https://perma.cc/P74W-Z49V].

the arbitration panel finds that it does not have jurisdiction as Metal-Tech's initial investment in Uzbekistan involved government corruption.[4]

As the above examples signify, corruption can be present at the inception of new foreign investments. One of the most controversial issues in international investment law is how arbitral panels should deal with these corruption-tainted investments. Given that international investment arbitrators have jurisdiction over foreign states and private investors, international investment law appears, at first, to be an ideal place to hold both governments and private investors accountable for corrupt actions. However, this optimism is misplaced—international investment arbitrators are ill-equipped to punish government officials for their abuse of power.[5]

Currently, the dominant approach of investment panels has been to refuse to hear investors' claims when the corruption allegations are substantiated.[6] This approach can benefit governments, who are generally the respondents in international investment arbitration cases. By refusing to hear claims where investors have engaged in corruption, investment panels provide governments with a shield against investment claims.[7] A recent wave of scholarship has attacked this "corruption defense," decrying its asymmetric effect of penalizing investors and immunizing states.[8] These

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4. Metal-Tech Ltd. v. Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award, ¶ 389 (Oct. 4, 2013), 54 I.L.M. 185, 257 (2015); *see also* Meshel, *supra* note 3; Michael A. Losco, *Charting a New Course:* Metal-Tech v. Uzbekistan *and the Treatment of Corruption in Investment Arbitration*, 64 DUKE L.J. ONLINE 37 (2014).

5. Cecily Rose has separately argued that arbitration panels are poorly equipped to adjudicate corruption claims because the public has an interest in allegations that emerge in these cases and that arbitration's high degree of confidentiality shields conduct from public scrutiny. *See* Cecily Rose, *Questioning the Role of International Arbitration in the Fight Against Corruption*, 31 J. INT'L ARB. 183, 222–28 (2014).

6. For one of the first articles to directly address this issue, see Jason Webb Yackee, *Investment Treaties and Investor Corruption: An Emerging Defense for Host States?*, 52 VA. J. INT'L L. 723 (2012).

This Essay is focused on whether the jurisdiction bar to arbitration panels adjudicating these cases is a good policy and, thus, does not address the evidentiary standards for proving corruption in arbitration. This is an important practical issue for parties alleging corruption, but it is also put to the side for this Essay, which assumes that corruption has been established for the purposes of the analysis. For an overview of the issue and an analysis of the correct evidentiary standard, see Nikolaus Pitkowitz, *The Arbitrator's Duty to Challenge Corruption*, *in* INTERNATIONAL ARBITRATION: WHEN EAST MEETS WEST 205 (Neil Kaplan, Michael Pryles & Chiann Bao eds., 2020); Rose, *supra* note 5, at 186–204.

7. *See* Yackee, *supra* note 6.

8. *See, e.g.*, Aloysius Llamzon, *The Control of Corruption Through International Investment Arbitration: Potential and Limitations*, 102 ASIL PROC. ANN. MEETING 208 (2008) [hereinafter Llamzon, *Control of Corruption*]; Andrew T. Bulovsky, Note, *Promises Unfulfilled: How Investment Arbitration Tribunals Mishandle Corruption Claims and Undermine International Development*, 118 MICH. L. REV. 117 (2019) [hereinafter Bulovsky, *Promises Unfulfilled*]; Andrew T. Bulovsky, *The Over- and Under-Enforcement of Anti-Corruption Law in Investment Disputes and International Development*, 9 CAMBRIDGE INT'L L.J. 264 (2020); Joachim Drude, Fiat Iustitia, Ne Pereat Mundus*: A Novel Approach to Corruption and Investment Arbitration*, 35 J. INT'L ARB. 665 (2018); Margareta

scholars argue that this practice is a poor policy choice that unfairly harms investors and encourages states to maintain corrupt practices.[9]

This Essay provides a counterweight, articulating a justification for maintaining the jurisdictional ban in cases where the initial investment was made through corrupt acts. It does so by analyzing the corruption defense's effects on the incentives of both countries and investors to engage in corruption. This policy analysis is necessary and important to provide a theoretical foundation that justifies the current approach.

This Essay confronts three core public policy questions at the heart of addressing investor corruption in international investment law:

(1) Would the elimination of the corruption defense lead governments to adopt meaningful anti-corruption reform?

(2) Does corrupt foreign investment systematically improve economic and political conditions in the host states to a sufficient degree to warrant investment protection?

(3) Do the governments who establish the investment treaties that set the contractual terms between states want protections for corrupt investment?

In analyzing these questions, the Essay responds to the major arguments of the critics and explores the role of international investment in the broader framework of transnational anti-corruption law. It evaluates the various policy claims and concludes that, while there are no ideal solutions, the jurisdictional ban is the best available policy option for promoting development and curbing corruption. Because this Essay's goal is to tackle the major policy questions at the heart of the corruption debate in investment

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Habazin, *Investor Corruption as a Defense Strategy of Host States in International Investment Arbitration: Investors' Corrupt Acts Give an Unfair Advantage to Host States in Investment Arbitration*, 18 CARDOZO J. CONFLICT RESOL. 805 (2017); Kevin Lim, *Upholding Corrupt Investors' Claims Against Complicit or Compliant Host States—Where Angels Should Not Fear to Tread*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 2011–2012, at 601 (2013); Aloysius P. Llamzon, *State Responsibility for Corruption: A Return to Regular Order*, *in* EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW 2021, at 107 (2021) [hereinafter Llamzon, *State Responsibility*]; ALOYSIUS P. LLAMZON, CORRUPTION IN INTERNATIONAL INVESTMENT ARBITRATION (2014) [hereinafter LLAMZON, CORRUPTION IN INTERNATIONAL INVESTMENT ARBITRATION]; Tamar Meshel, *The Use and Misuse of the Corruption Defence in International Investment Arbitration*, 30 J. INT'L ARB. 267, 280 (2013); Diana A. A. Reisman, *Apportioning Fault for Performance Corruption in Investment Arbitration*, 37 ARB. INT'L 1 (2021); Nassib G. Ziadé, *Accountability for Corruption in Investment Arbitration: Equitable Remedies for Findings of Illegality*, 3 BCDR INT'L ARB. REV. 423 (2016).

9. *See* sources cited *supra* note 8; *see also* Yarik Kryvoi, *Economic Crimes in International Investment Law*, 67 INT'L & COMPAR. L.Q. 577 (2018); Yueming Yan, *Anti-Corruption Provisions in International Investment Agreements: Investor Obligations, Sustainability Considerations, and Symmetric Balance*, 23 J. INT'L ECON. L. 989, 997–99 (2020).

arbitration, it is formulated as a public policy analysis, rather than as a doctrinal analysis of arbitration rules.[10]

This Essay proceeds by addressing each of the above policy questions in turn. It begins by considering whether the elimination of the corruption defense would lead governments to adopt more anti-corruption measures. Specifically, the Essay examines how different approaches to corruption in investment arbitration affect governments' and corporations' interests in eliminating corrupt practices, highlighting that both corporations and governments are a "'they', not an 'it.'"[11] Much of the current debate considers investors (most often multinational corporations) and states to be "unitary" persons, who have full control over the actions that are being arbitrated and who will internalize the costs of an investment judgment. Both multinational corporations (MNCs) and states are collective entities, albeit ones with very different goals, governance structures, accountability mechanisms, and decision-making processes. Consequently, corporations are far more responsive to financial sanctions than governments are and, thus, the elimination of the corruption defense is unlikely to lead to anti-corruption reforms.

Advocates of eliminating the defense argue that doing so would force governments to internalize the costs of corruption and incentivize them to invest in more anti-corruption programs, just as we think monetary judgments against corporations incentivize their investment in compliance programs. However, this Essay argues that eliminating the corruption defense is unlikely to have a major impact on state policymaking. Specifically, this Essay highlights that, unlike corporations, governments are not entities that are driven by profits, but are instead driven by political support. An arbitral award from investment law arbitration panels translates

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10. In focusing on a policy analysis, this Essay does not address several doctrinal issues that are often raised in the context of arbitrating corruption allegations in international investment law. First, the Essay does not discuss the relationship between state and government officials that may be relevant under theories of state responsibility. This is a highly contested area in the context of corruption where the government official is explicitly acting outside of the state's legal framework as well as acting in their own personal interests and abusing their state office by effectively stealing from the state. Commentators disagree about whether governments should be held responsible for these actors, and, if so, under what conditions. *See* Clara Reichenbach, *The Corruption Defence and the Jurisdictional Consequences of Corruption Allegations in International Law and Investment Arbitration*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2020, 406, 437 ¶¶ 21.65–.73 (Lisa E. Sachs, Lise J. Johnson & Jesse Coleman eds., 2020) (discussing the debate); *see also* JAMES CRAWFORD, STATE RESPONSIBILITY: THE GENERAL PART 137–38 (2013) (determining that states were not responsible for government officials when those officials were acting outside of their official capacities and specifying solicitation of a bribe as an example of officials acting outside their official capacity). Given the contested nature of this theory's application to investment claims as well as the specialized nature of the legal inquiry, this Essay places this issue to the side in favor of a more policy-based analysis of the specific question.

11. This Essay takes its collective entity analysis from Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 244 (1992).

only modestly (if at all) into a loss of political support and, thus, does not necessarily motivate governments to adopt anti-corruption reforms. In addition, governments are often decentralized, and even highly motivated governments may have difficulty controlling corruption. By contrast, corporations are profit-maximizing entities that can more readily respond to financial incentives, as they have better tools (financial compensation, hiring and firing, employee monitoring) to enforce anti-corruption policies.

While an arbitral award is unlikely to change a government's anti-corruption policy, eliminating the corruption defense does have a public policy effect. Investment arbitration awards can impose a significant burden on the host country's population, who ultimately bear the costs of paying judgments. Eliminating the corruption defense will compensate corrupt investors for their losses but will put that liability on the country's population, not its government leaders. This effectively burdens the country's population with the costs of corruption two times—once when the initial corruption occurs[12] and again when they are required to compensate the corrupt investor for their losses.

More broadly, this Essay contextualizes the struggle against transnational corruption within the broader set of anti-corruption measures that exist in international economic law. Although most critiques of the corruption defense view international investment law in isolation and thus consider only international arbitral mechanisms for controlling government corruption, a host of national anti-foreign corruption laws also influence governments' policy choices and corporations' foreign investment decisions. These laws, such as the United States' Foreign Corrupt Practices Act[13] and the United Kingdom's Bribery Act,[14] also have significant economic effects and should be part of any policy analysis of the corruption defense. This Essay provides such an analysis and highlights that governments already have considerable economic incentives to engage in anti-corruption reform notwithstanding a corruption defense.

Second, this Essay considers the question of whether corrupt investment is beneficial to the economic and political conditions of the host state and thus deserves investment protection. On balance, it does not. This Part analyzes the differences between corrupt and clean foreign investment on a host country's economic growth and makes the case for drawing a distinction between the two types of investment on that basis. International investment law is often viewed as a bargain between states and investors. Investors provide fresh capital that produces economic growth in the host state in return for assurance from governments that these investments will

12. *See infra* Part III.
13. Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd.
14. Bribery Act 2010, c. 23 (UK).

receive certain protections, enforced through international arbitration. Drawing on the insights from economics literature on the effects of corruption, this Essay argues that corrupt investment distorts government spending, crowds out clean investment with higher economic benefits, and entrenches corrupt government structures. This distinction is important for properly evaluating arguments that corrupt investors aid the economic and political development in the host state.

Finally, this Essay considers the question of whether investment treaties, the interstate contracts that set the terms of investment law, cover corrupt investment. This Part argues that governments have crafted investment treaties to exclude investments that violate the state's laws, as corruption certainly does. Furthermore, there is a clear trend of governments in capital-exporting as well as capital-importing states moving to bar the protection of corrupt investment more explicitly. The decision of governments to exclude corrupt investment from treaty protections reflects these governments' judgment that the corruption defense provides the best policy balance.

The question of how to address corruption in investment is not an easy one. Successful bribes involve two parties engaged in a criminal act. The types of bribes covered in this Essay, where the corruption is made at the entrance of the investment into the country, tend to be large-scale bribery, enough to secure a government contract or receive a concession from the government.[15] In such cases, investors and government officials are active parties to the corruption. It is neither a case of mercenary investors and innocent governments, nor helpless investors and rapacious governments. The difficulty in cutting this Gordian knot may be one of the reasons for popularity of this topic in the international investment law field but should also caution a fair share of humility in posing solutions.

This Essay has four Parts. Part I briefly reviews the debate over the corruption defense in international investment arbitration and discusses the technical aspects of its invocation, including jurisdictional restrictions found in investment treaties. Part II provides the first part of this Essay's policy analysis by examining how the corruption defense influences government policy and corporate investment flows. In doing so, this Part addresses how liability for corruption under investment rules affects anti-corruption policy in firms and in countries. Part III analyzes how corrupt and non-corrupt investment differ in their effects on the economic and political development of host states. This Part details how corrupt investment often distorts government spending, lowers economic performance, and crowds out clean investment that has greater benefits for

15. *See* Llamzon, *State Responsibility*, *supra* note 8 (acknowledging that it can be common for investors to provide large bribes when entering foreign markets through government procurement contracts).

states. These economic differences between corrupt and non-corrupt investment justify different policy prescriptions in investment arbitration. Part IV then examines the scope of investment treaties and provides a justification for the defense based in treaty design and fairness. The Conclusion discusses alternative mechanisms and fora outside of international investment law that could be more effective for controlling government corruption. This Part finds that there are better means than investment arbitral awards to address the problem of corrupt government officials.

I. THE CORRUPTION DEFENSE

Corruption, generally defined as the misuse of public power for private gain,[16] is universally condemned. Every national legal system has laws prohibiting both the offer of a bribe (the "supply side") as well as the demand for or receipt of a bribe (the "demand side").[17] In addition, there are multiple international treaties condemning and criminalizing corrupt transactions, most notably the OECD's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions[18] (the "OECD Anti-Bribery Convention") and the UN Convention Against Corruption.[19] Notwithstanding the condemnation against corruption, bribery continues to exist in foreign investment,[20] and thus it is an issue with which international arbitration panels have had to grapple. Indeed, as one investment law scholar notes, "it is not unusual for bribes to have attended the entry into a high-value contract involving a foreign State as counter-party."[21]

The circumstances that this Essay addresses are those in which a private investor and a foreign government official engage in bribery at the entry of the investment into the foreign market. In these cases, a foreign investor can often offer a bribe to the foreign government official to win a contract or a concession.[22] The investor later alleges that the foreign state has engaged in some other conduct that violates the terms of an applicable investment treaty and seeks to arbitrate against the state through the applicable investment

16. Jakob Svensson, *Eight Questions About Corruption*, 19 J. ECON. PERSPS. 19, 20 (2005).

17. Philip M. Nichols, *The Business Case for Complying with Bribery Laws*, 49 AM. BUS. L.J. 325, 326 (2012).

18. Organisation for Economic Co-operation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1.

19. U.N. Convention Against Corruption, Oct. 31, 2003, 2349 U.N.T.S. 41. For a discussion of the content of the OECD and UN treaties, see CECILY ROSE, INTERNATIONAL ANTI-CORRUPTION NORMS: THEIR CREATION AND INFLUENCE ON DOMESTIC LEGAL SYSTEMS (2015).

20. *See* Yackee, *supra* note 6.

21. Llamzon, *State Responsibility*, *supra* note 8.

22. For a review of several cases, see *id.*

treaty. At this point, the state can raise the investor's corruption as a defense against the claim, arguing that investors should not get the benefit of investment treaty protections when the investor has corruptly entered the market.[23]

Most arbitral panels dismiss these claims. The first International Center for the Settlement of Investment Disputes (ICSID) arbitration panel to adjudicate the question (*World Duty Free v. Kenya*) dismissed the investor's contract-based claims because the contract itself had been obtained through corruption.[24] The panel relied on conceptions of transnational public policy to support its finding that corruption allowed the panel to dismiss the investors' claims.[25] In *World Duty Free*, the panel dismissed the case on the merits.[26] However, in more recent decisions, investment arbitration panels have anchored their jurisdictional analysis in treaty interpretation by relying on a clause found in most BITs that requires investments be made in accordance with host state law.[27] Arbitration panels have found that the payment of bribes by corporations at the inception of the investment is a violation of local law.[28] As a result, the claim does not fall under the jurisdiction of the tribunal, whose jurisdiction is limited by the treaty's legality requirement that investments be made in accordance with local law.[29]

A few commentators have praised this approach as necessary to promote beneficial investment given the well-established norms against corruption.[30] They argue that providing treaty protections for corrupt investment would be contrary to public policy. Doing so would provide protection for investors who have worked to undermine the state's legal regime and

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23. *See* Yackee, *supra* note 6, at 729–34.

24. World Duty Free Co. v. Republic of Kenya, ICSID Case No. ARB/00/7, Award (Oct. 4, 2006), 46 I.L.M. 339 (2007). For an analysis of the case, see Yackee, *supra* note 6, at 729–34.

25. *World Duty Free*, ICSID Case No. ARB/00/7, Award, ¶ 157 (finding that both domestic law and international conventions prohibited corruption and thereby dismissing claims based on a contract obtained through corruption as against international public policy).

26. Yackee, *supra* note 6, at 732.

27. *See* Metal-Tech Ltd. v. Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award (Oct. 4, 2013), 54 I.L.M. 185 (2015); Fraport AG Frankfurt Airport Servs. Worldwide v. Republic of the Philippines, ICSID Case No. ARB/11/12, Award (Dec. 10, 2014) (involving allegations of corruption but dismissed based on a lack of jurisdiction due to other breaches of the host state's law). For a discussion of investment arbitration cases involving allegations of corruption, see Julien Chaisse, *Tackling Corruption in Foreign Investment: Insights from Investment Arbitration Cases*, 16 LAW & DEV. REV. 253, 269–78 (2023). For analysis of "legality" treaty provisions, see Stefan Mbiyavanga, *Combating Corruption Through International Investment Treaty Law*, 1 J. ANTI-CORRUPTION L. 132 (2017); Reichenbach, *supra* note 10, ¶¶ 21.07–.13.

28. *Metal-Tech*, ICSID Case No. ARB/10/3, Award, ¶¶ 372–73.

29. *See* Mbiyavanga, *supra* note 27, at 137–40; Yan, *supra* note 9, at 997–99.

30. *See* Mbiyavanga, *supra* note 27, at 132–50 (arguing that strong anti-corruption clauses in investment treaties will help fight corruption); *see also* Losco, *supra* note 1, at 1232 ("A robust corruption defense in ICSID arbitration proceedings is an essential part of global efforts to stem the tide of corruption, especially in developing, capital-importing states."); Losco, *supra* note 4.

engaged in corruption that harms the state's economic development. While commentators note that this is "a blunt remedy,"[31] they argue that clearly putting corruption outside of the protection of international law is appropriate.

The overwhelming majority of recent academic commentators have opposed this development. They argue that arbitration panels should retain jurisdiction in these cases, adjudicate the case (by applying some formula of comparative fault for the corruption), and issue an award.[32] Proponents of this approach often claim that it better supports public policy in several ways. To start, these commentators argue that a comparative fault approach ensures government officials will not demand bribes from investors in anticipation of using their own corruption as a defense (addressing the moral hazard concern).[33] In addition, supporters argue that the comparative fault approach is more equitable because it holds both parties responsible for corruption and does not asymmetrically punish investors. Some scholars additionally argue that adverse arbitration awards will force governments to engage in anti-corruption reform and are, therefore, beneficial for public policy.[34]

Although commentators tend to focus on how the corruption defense aligns with the goals of the international investment system, a practical note about how the corruption defense works in practice is in order. There is reason to believe that many investments are tainted by corruption, but the invocation of the corruption defense is still somewhat uncommon in practice[35]—used in only a small fraction of the cases in which it could be relevant. This is likely because both parties have reasons to keep corruption issues out of public investment arbitration.

Investors may be reluctant to bring claims against states where there has been corruption because they do not want to alert their home state's authorities of their foreign corrupt practices.[36] Investors are liable not only under the laws of the investment host state but also under the laws of many states with extraterritorial legislation that covers foreign bribery. The OECD Anti-Bribery Convention has forty-four signatories, each of which has enacted domestic legislation to criminalize foreign bribery. Most of the major capital-exporting states have signed the OECD Anti-Bribery

31. Losco, *supra* note 4, at 48.
32. *See* sources cited *supra* notes 8–9.
33. *See, e.g.*, Llamzon, *Control of Corruption*, *supra* note 8, at 210.
34. *See* Bulovsky, *Promises Unfulfilled*, *supra* note 8, at 136–47.
35. *See* Chaisse, *supra* note 27 at 269–78 (discussing the cases where it has been invoked).
36. Joan E. Donoghue, *The Corruption Trump in Investment Arbitration*, 30 ICSID REV. 756, 760 (2015) (reviewing LLAMZON, CORRUPTION IN INTERNATIONAL INVESTMENT ARBITRATION, *supra* note 8).

Convention (with the exception of China), meaning many foreign investors have liability in their home country as well as the host country.

In addition, the United States and the United Kingdom both have very broad jurisdictional bases for the application of their anti-bribery law. The United States claims that its anti-bribery law, the Foreign Corrupt Practices Act (FCPA), has jurisdiction not only over all American corporations and nationals but also over any corporation that lists (primarily or secondarily) on an American exchange.[37] Meanwhile, the U.K.'s Bribery Act extends jurisdiction over any corporation doing business in its territory.[38] As a result, corporations are potentially subject to corruption prosecutions in multiple states, any number of which could choose to bring a prosecution.[39] The existence of several layers of potential liability for public corporations based in the United States or Europe will make these firms hesitant to bring an investment claim when there could be a credible counter-allegation of corruption.[40]

Similarly, governments interested in attracting foreign investment may be loath to assert claims of government corruption.[41] The state's primary goal in signing an investment treaty is to attract foreign investment (although it is empirically uncertain how much the treaty attracts).[42] However, even with the protection of a treaty, investors remain primarily

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37. For a discussion of how this broad jurisdiction gives the United States jurisdiction over much of international commerce, see Rachel Brewster, *Enforcing the FCPA: International Resonance and Domestic Strategy*, 103 VA. L. REV. 1611 (2017).

38. For an analysis of the combined deterrence effects of the U.S. FCPA and the U.K. Bribery Act on multinational corporations with exposure in both markets, see Amanda Sanseverino, *The Impact of Foreign Laws on U.S. Firms: Evidence from the U.K. Bribery Act*, REV. ACCT. STUD. (July 28, 2023), https://link.springer.com/article/10.1007/s11142-023-09783-8 [https://perma.cc/UNT7-SUQT].

39. For a discussion of the issues raised by multijurisdictional prosecutions, see KEVIN E. DAVIS, *How Should Transnational Bribery Law Be Enforced?*, *in* BETWEEN IMPUNITY AND IMPERIALISM: THE REGULATION OF TRANSNATIONAL BRIBERY 161 (2019); Sharon Oded, *Multi-Jurisdictional Anti-Corruption Enforcement: Time for a Global Approach*, 28 J.L. & POL'Y 510 (2020); Andrew S. Boutros & T. Markus Funk, *"Carbon Copy" Prosecutions: A Growing Anticorruption Phenomenon in a Shrinking World*, 2012 U. CHI. LEGAL F. 259; T. Markus Funk & Andrew S. Boutros, *Re-Examining "Carbon Copy" Prosecutions: A Look Back and Spring Forward*, 85 DEF. COUNS. J. 1 (2018).

40. *See* Donoghue, *supra* note 36, at 760–61.

41. *See* Losco, *supra* note 4, at 49.

42. *See* Clint Peinhardt & Todd Allee, *Failure to Deliver: The Investment Effect of US Preferential Economic Agreements*, 35 WORLD ECON. 757 (2012) (finding U.S. BITs do not lead to more bilateral investment); Adam Chilton & Weijia Rao, The Collateral Consequences of International Agreements: Evidence from Bilateral Investment Treaties (2023) (unpublished manuscript) (on file with author) (finding that BITs do not lead to more bilateral investment flows); Emma Aisbett, Matthias Busse & Peter Nunnenkamp, *Bilateral Investment Treaties as Deterrents of Host-Country Discretion: The Impact of Investor-State Disputes on Foreign Direct Investment in Developing Countries*, 154 REV. WORLD ECON. 119 (2018) (finding that BITs lead to increased bilateral FDI flows from partner countries only if the developing host country has not been sued under an investment treaty); Jason Webb Yackee, *Do BITs 'Work'? Empirical Evidence from France*, 7 J. INT'L DISP. SETTLEMENT 55 (2016); Jason Webb Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, 51 VA. J. INT'L L. 397 (2011).

interested in whether their foreign projects are commercially viable given the political, economic, and social conditions in the country. Corruption can be an issue that deters many foreign investors because of what it signals about a country's business climate as well as the investors' potential for liability in their home states.[43] As a result, states do not wish to announce publicly that their government officials were corrupt—and they may be particularly averse to claiming it multiple times—as it can cost them future investment.[44]

However, if the arbitration is confidential, investors may be more willing to try to arbitrate investment claims, and governments may see fewer barriers to invoking the corruption defense (although both sides would have to be concerned about leaks).[45] As a result, this debate is not just a theoretical one even though we do not see that many cases of the defense at present.

II. STATES AND INVESTORS: AN ANALYSIS OF THE IMPACT OF DAMAGE AWARDS

This Part analyzes whether eliminating the corruption defense would lead governments to make meaningful anti-corruption reforms. This Part first discusses why international investment law appears to many to be such an appealing forum to address the demand side of corruption. This Part then analyzes how governments and firms respond differently to financial incentives, such as arbitral awards or other monetary penalties. In sum, corporations are quite responsive to monetary incentives, but governments are significantly less responsive because they seek to maximize political support, which is only loosely connected to paying monetary awards. While arbitral awards can place a substantial financial burden on states, arbitral awards are unlikely to change state policy because government leaders do not directly bear these costs. This analysis has important implications for

43. For a discussion of the effects of the FCPA on foreign direct investment in the United States and non-U.S. countries, see Hans B. Christensen, Mark G. Maffett & Thomas Rauter, *Policeman for the World: The Impact of Extraterritorial FCPA Enforcement on Foreign Investment and Internal Controls*, 97 ACCT. REV. 189, 189 (2022) (finding that the FCPA "has a significant deterrent effect on foreign direct investment in high-corruption-risk countries" on U.S. and non-U.S. firms headquartered in developed countries); *see also* Alvaro Cuervo-Cazurra, *Who Cares About Corruption?*, 37 J. INT'L BUS. STUD. 807 (2006) (discussing the effect of developed states' anti-bribery provisions on foreign investment in developing states).

44. *See* Losco, *supra* note 4, at 49.

45. It is hard to know what percentage of investment awards are confidential because confidential awards can be invisible to those who gather data. One rough estimate is that less than 20% of investment awards are never made public. *See* Malcolm Langford, Daniel Behn & Ole Kristian Fauchald, *Backlash and State Strategies in International Investment Law*, *in* THE CHANGING PRACTICES OF INTERNATIONAL LAW 70, 72 n.10 (Tanja Aalberts & Thomas Gammeltoft-Hansen eds., 2018) ("Our estimate is that less than 20 per cent of ITA awards are not in the public domain.").

policy questions such as whether international investment law can make significant inroads to address corruption in host countries. It concludes that investment arbitration is a poor forum for deterring corruption by government officials, and the Conclusion addresses how other forums are more effective. The Conclusion ends by arguing that while the corruption defense is unlikely to help address corruption issues within the host state, it does impose constraints on investors not otherwise covered by foreign anti-bribery laws.

A. Regulating the "Demand Side" of Corruption

The possibility that international investment law could possibly address government corruption is very attractive to anti-corruption scholars and activists because there are notoriously few avenues to address the "demand side" of corruption: government officials who engage in corruption.[46] Laws such as the FCPA and the U.K. Bribery Act address the "supply side" of corruption: firms that offer bribes to government officials.[47] The demand side is harder to regulate.[48] States can certainly regulate their own government officials, and some do.[49] For example, of the seven Illinois governors who served between 1961 and 2009, the United States put four of them in jail for corruption.[50] But in many countries where corruption concerns are the greatest, it can be incredibly difficult to charge government leaders with corruption. There are currently no international mechanisms to bring criminal charges against government officials,[51] although there are

46. *See* Lucinda A. Low, Sarah R. Lamoree & John London, *The "Demand Side" of Transnational Bribery and Corruption: Why Leveling the Playing Field on the Supply Side Isn't Enough*, 84 FORDHAM L. REV. 563, 566 (2015) ("Prosecution of the demand side of bribery is generally left to the host country, particularly when the recipient is a public official. However, weak enforcement mechanisms, the lack of political will, official immunities, and other barriers leave the vast majority of bribe recipients unprosecuted." (footnotes omitted)).

47. *Id.* at 564 (describing the FCPA as a law aimed at the supply side of corruption).

48. *Id.* at 566.

49. *See* discussion *infra* Conclusion.

50. Those governors were Rod Blagojevich, George Ryan, Dan Walker, and Otto Kerner. *4 of Illinois' Last 7 Governors Went to Prison*, OMAHA WORLD HERALD (Oct. 16, 2019), https://omaha.com/news/4-of-illinois-last-7-governors-went-to-prison/article_db3679ca-239b-594d-84ea-f34a0685bc1a.html [https://perma.cc/964C-ZPUD].

51. The International Criminal Court (ICC) does not have jurisdiction to hear cases involving corruption, only cases involving its jurisdiction over the four crimes of genocide, crimes against humanity, war crimes, and aggression. The Rome Statute (the treaty creating the ICC) could be amended to give the court jurisdiction over corruption, but that would require two-thirds of the state members to agree. *See* MARK L. WOLF, RICHARD GOLDSTONE & ROBERT I. ROTBERG, AM. ACAD. OF ARTS & SCIS., THE PROGRESSING PROPOSAL FOR AN INTERNATIONAL ANTI-CORRUPTION COURT 11 (2022), https://www.amacad.org/sites/default/files/publication/downloads/2022_International-Anticorruption-Court.pdf [https://perma.cc/F6SE-Q9KV].

now calls for an International Anti-Corruption Court to address impunity in national regimes.[52]

An alternative is for governments other than the corrupt official's national government to bring criminal charges. While legal mechanisms exist for such an action, there are practical barriers to obtaining jurisdiction over defendants. The instances in which the United States has charged former foreign government officials with money laundering and conspiracy to violate the FCPA frequently involve foreign officials who have moved to the United States. However, those who travel to the United States (and thus put themselves in American jurisdiction) are a limited class of people.[53] This mechanism of enforcement does not represent a general solution to the demand side of corruption.

In contrast to national criminal or civil cases, international investment arbitration regularly has jurisdiction over states. As a result, investment arbitral panels, in theory, could provide an opportunity to address the demand side of corruption. Although arbitral panels do not have the power to fine *individual government officials* (let alone incarcerate them), the jurisdiction over foreign states is an alluring prospect. Scholars generally think that imposing monetary fines on *corporations* is a useful means of regulating their corrupt practices,[54] although several critique whether this is as good of a deterrent when the threat of individual criminal sanctions is not also available.[55] But the relevant question is whether imposing monetary

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52. For a discussion of the problem of government officials' impunity and the proposed court, see *id.* at 10. For an evaluation and critique of the proposal, see MATTHEW C. STEPHENSON & SOFIE ARJON SCHÜTTE, CHR. MICHELSEN INST., AN INTERNATIONAL ANTI-CORRUPTION COURT? A SYNOPSIS OF THE DEBATE (2019), https://www.u4.no/publications/an-international-anti-corruption-court-a-synopsis-of-the-debate.pdf [https://perma.cc/XL63-Y25Q].

53. *See* United States v. Duperval, 777 F.3d 1324, 1327 (11th Cir. 2015) (affirming Duperval's conviction and nine-year prison sentence on conspiracy and money laundering charges for accepting bribes in his capacity as head of the Haitian telecom authority); *see also* Drew Douglas, *Former Senior Haitian Telecom Official Gets Nine-Year Prison Term in FCPA Case*, BLOOMBERG L. (May 23, 2012, 2:27 PM), https://news.bloomberglaw.com/white-collar-and-criminal-law/former-senior-haitian-telecom-official-gets-nine-year-prison-term-in-fcpa-case [https://perma.cc/X3HY-NSRM].

54. *See* DAVIS, *supra* note 39; Nichols, *supra* note 17; Brewster, *supra* note 37; Christensen et al., *supra* note 43 (providing empirical evidence that the threat of fines does decrease corrupt action); *see also* Rachel Brewster & Samuel W. Buell, *The Market for Global Anticorruption Enforcement*, 80 LAW & CONTEMP. PROBS. 193 (2017) (discussing the FCPA's use of fines to change the behavior of MNCs).

55. BRANDON L. GARRETT, TOO BIG TO JAIL (2014); Brandon L. Garrett, *Individuals and Corporate Criminals*, *in* RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING 40 (Jennifer Arlen ed., 2018) (both discussing how corporations might view fines as part of the cost of doing business without the credible threat of individual prosecutions for wrong doers); DAVIS, *supra* note 39 (discussing the value of individual prosecutions); *see also* Press Release, UNCAC Coalition, Letter to OECD Secretary General Angel Gurria: Global Standards for Corporate Settlements in Foreign Bribery Cases (Mar. 11, 2016), https://uncaccoalition.org/letter-to-oecd-secretary-general-angel-gurria-global-standards-for-corporate-settlements-in-foreign-bribery-cases/ [https://perma.cc/5XJQ-X2K8] (letter from civil society groups and non-governmental organizations calling for high standards for

losses on the *state* for corruption through foreign investment awards is a productive means to address the demand side of corruption.

Commentators who oppose the availability of the corruption defense often argue that disallowing the defense would help many developing countries address corruption. The idea is that imposing large fines would give the foreign government the correct incentives to address corruption.[56] As one commentator argues, the citizens of host states would be better off if investors could bring claims where the investor engaged in corruption because such a claim assists in anti-corruption efforts by making the state internalize the costs of its own conduct.[57] A weaker version of the argument is that the existence of the corruption defense allows host countries to "profit" off of their corrupt acts[58] and motivates foreign governments to retain corrupt practices as a means to "wriggle out of" investment arbitration claims.[59]

B. Comparing Corporations and Governments

Could barring the corruption defense be a good mechanism to regulate the demand side of corruption?[60] To analyze this question, we must understand how governments internalize monetary damages. There is no

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corporate settlements, including more prosecutions of individuals involved in corporate corrupt practices).

56. *See* Bulovsky, *Promises Unfulfilled*, *supra* note 8, at 133 ("[M]any countries underenforce their own anti-corruption laws, due in large part to a lack of resources and political will. Investment tribunals could fill the gaps by serving as a venue for the private enforcement of anti-corruption efforts. This potential remains unfulfilled because investment tribunals have continued to shut their doors to investors who were but one party to the bribe." (footnotes omitted)).

57. *Id.* at 142 ("But while the proposed framework promotes investors' access to tribunals, it also benefits host states and their citizens because it assists anti-corruption efforts. Arbitral tribunals that decline to exercise jurisdiction over a corruption-tainted dispute fail to address the demand side of corruption. This failure allows the host state to escape liability for its role in the corrupt act and thus helps the state avoid internalizing the costs of its own conduct.").

58. Habazin, *supra* note 8, at 827 (noting that the defense allows "the states to profit from their own violation" and should not be permitted because it "might not motivate the host states to change their corrupt domestic culture or the corrupt practices of their officials"); *see also* Llamzon, *State Responsibility*, *supra* note 8 (discussing the moral hazard of allowing host states to claim corruption includes not motivating the state to change its practices).

59. Habazin, *supra* note 8, at 826–27 ("The host states have identified the corruption defense as an opportunity to wriggle out of costly investment disputes . . . [and the corruption defense] might encourage the states to maintain their corrupt systems."); *see also* W. Michael Reisman, *Foreword* to LLAMZON, CORRUPTION IN INTERNATIONAL INVESTMENT ARBITRATION, *supra* note 8 (noting that the corruption defense may "actually incentivize official demands for bribes") (quoted in Llamzon, *State Responsibility*, *supra* note 8).

60. A separate question is whether investors should be allowed to make investment law claims for being denied a concession or contract because the investor was unwilling to make a bribe. There is near consensus that this would be a legitimate claim because the investor was denied due process of law in the public procurement process and refused to engage in corruption. While such a claim may not notably improve the corruption climate in the state, it seems to be a far more solid basis for a claim than one where the investor acted corruptly and violated local laws.

one way states do so, but all governments (even repressive regimes) seek to maintain sufficient public support to remain in power. For the sake of discussion, this Essay first discusses how corporations (the most common investors) internalize costs and then turns to governments.

Corporations are created for one primary goal: to generate profits for their shareholders.[61] Corporations regularly face agency costs—the core of American corporate law focuses on how legal rules regulate the relationship between managers and shareholders.[62] Nonetheless, corporations' primary focus on profits creates a clear benchmark upon which current and prospective shareholders can evaluate managers and firm performance.[63] Managers who fail to meet this benchmark face lower compensation, replacement by the board (representing shareholders), or, at the extreme, a hostile take-over.[64]

The corporation's primary focus on profits, along with the board's ability to replace any manager or employee, provides it with the ideal structure to respond to financial incentives. Fines, particularly large ones, directly decrease the firm's resources and profits. If the corporation has a practice that credibly could lead to liability—say a $1 million fine for corrupt practices—the corporation will either establish (or improve) compliance programs to prevent further corrupt actions up to the expected value of the fine, or simply end the practice, whichever is less expensive.[65] Managers who fail to adopt such policies are likely to face negative employment outcomes. While there are agency costs and satisficing behavior, those are around the margins.

Governments, however, do not engage in the rational cost-benefit calculations that we assume corporations do.[66] Governments are neither profit-maximizing nor judged against clear benchmarks, and they can be decentralized and difficult to replace.[67] Governments seek political support

61. The current push for "corporate purpose" argues that corporations should be concerned with profits and ESG goals. Often, however, advocates argue that ESG goals can make corporations *more profitable* over the longer term, so ESG goals are a profit-maximizing strategy rather than an alternative model. *See, e.g.*, George Serafeim, *Social-Impact Efforts that Create Real Value*, HARV. BUS. REV., Sept.–Oct. 2020, at 38 (arguing that socially impactful corporations are more profitable).

62. *See* Zohar Goshen & Richard Squire, *Principal Costs: A New Theory for Corporate Law and Governance*, 117 COLUM. L. REV. 767, 769 (2017) ("For the last forty years, the problem of agency costs has dominated the study of corporate law and governance. . . . Many scholars . . . treat the reduction of agency costs as the essential function of corporate law and of related fields such as securities regulation.").

63. Jonathan R. Macey, *ESG Investing: Why Here? Why Now?*, 19 BERKELEY BUS. L.J. 258 (2022).

64. *Id.* at 259.

65. *See* DAVIS, *supra* note 39, at 151–53.

66. Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 348–57 (2000); Richard Frankel, *Regulating Privatized Government Through § 1983*, 76 U. CHI. L. REV. 1449, 1484–90 (2009).

67. Levinson, *supra* note 66, at 356–57.

from constituents, who care about a host of social, economic, and governance issues, only some of which are related to fiscal matters.[68] As Daryl Levinson argues, governments and constituents do not put any inherent value on cash inflows and cash outflows.[69] Whether the government runs a deficit or raises (or lowers) taxes on some segment of the population is only one issue among many with which citizens are concerned.[70] As a result, there is not a clear benchmark for government success upon which citizens agree.[71] Citizens are likely to support governments based on a host of other factors—from identity politics (often along ethnic lines but also along social identification) to social policy preferences—as much, if not more than, fiscal policy.[72]

Even if the negative arbitral award creates a fiscal cost, governments have many ways to distribute the costs of a policy (or arbitral award) among their citizens.[73] Unlike corporations—whose shareholders hold a pro rata share of the firm's residual value and are equally affected by economic upturns and downturns—governments do not have to equally distribute the costs of monetary outflows across the citizenry.[74] Instead, a government can distribute the costs of money judgments to members of the population who are not in their political coalition by raising taxes on a region or reducing spending on specific groups (formally or informally).[75] Constituencies may not even connect specific government spending with adverse arbitral awards given the size and breadth of government budgets.[76] In addition, there can be significant time lag between when the investment treaty violation occurred and when an arbitral judgment is paid.[77] This further attenuates a constituency's link between the violation and the budget outflow.

Governments are also not as centralized as corporations and, thus, have fewer means of effective organizational control. Governments tend to be far more decentralized, both at the national and subnational levels. This varies significantly between states, with authoritarian states being more centralized than democratic states. For instance, in states with proportional representation and multiple political parties, national governments are made up of coalition partners. If a coalition member (even the coalition leader) is

68. *Id.* at 355–57.
69. *Id.* at 357.
70. *Id.* at 355.
71. *Id.* at 356.
72. *Id.* at 355; *see also* Frankel, *supra* note 66, at 1486 ("Unlike the clear economic incentive for private entities to maintain an efficient level of liability, the political incentives facing government actors are muddier.").
73. Levinson, *supra* note 66, at 355; Frankel, *supra* note 66, at 1488–89.
74. Levinson, *supra* note 66, at 355.
75. *Id.*
76. Frankel, *supra* note 66, at 1489.
77. *Id.* at 1487–88.

unhappy with the policies of another member, the former cannot fire the member without bringing down the government. Further, states delegate significant policy power to the sub-state level, with regional governors and city leaders. These individuals are generally elected directly and cannot be fired by the central government even if they resist national government policies. As a result, governments cannot monitor and discipline national and sub-national government action as easily as corporations can discipline their divisions, branches, and subsidiaries.

Finally, unlike corporations, government leaders can be hard to replace in the short term and long term.[78] Even in the face of serious allegations on fiscal or corruption matters, governments can stay in power for years. In presidential systems, the government normally has a fixed term in office and impeachment can be an extremely difficult mechanism to use successfully. In parliamentary systems, the existing government has significant discretion to decide when to call elections if they can maintain their coalition. In less democratic systems, government leaders can hold on to power indefinitely. As a result, government leaders do not face the same discipline as corporate leaders in achieving fiscal goals.[79] Unlike corporate executives, government leaders cannot be fired by a board of directors for poor performance.

C. Application to Investment Awards Against Governments

All these factors make governments far less responsive to investment arbitral awards than corporations. If a government is faced with an investment panel judgment for a corruption-based claim, it is unlikely to respond as a corporation would. First, government officials are not like corporate managers.[80] The need to pay money to satisfy the award does not necessarily lead them to engage in spending (for instance, by funding anti-corruption programs) to address the problem. Passing legislation to allocate such spending requires the use of political capital, which the government might wish to allocate to other issues. In addition, the problems of corruption may be entrenched at the state or local level, over which the national government has less control.

Second, the existence of an adverse arbitral award will not necessarily lead to less political support for the government. To the extent that the government can assign the costs of the award to a political "outgroup" or otherwise deflect the costs of the award (for instance, through opaque deficit spending), then the government will not necessarily face domestic

78. Levinson, *supra* note 66, at 356.
79. *Id.*
80. *See supra* Section II.B.

challenges due to the judgment. Governments may even experience increased domestic support from adverse investment judgments if the population views the judgment as illegitimate or an unjustified attack on their nation.[81]

Third, even a government sincerely dedicated to anti-corruption reform can face significant challenges in addressing domestic corruption.[82] Government corruption is a notoriously hard issue to address.[83] The problem of the demand side of corruption involves political structures, entrenched practices, and uncertain policy remedies. For instance, even anti-corruption advocates disagree about what measures decrease corruption in the civil service (higher pay, geographic rotation, etc.), and, consequently, disagree about what policies could lead to better or worse outcomes.[84] Societies and governments are simply more complex organizations than profit-oriented corporations and, therefore, are less easy to influence by adverse investment awards. We can see the same in the foreign aid context, where donor governments have been willing to provide greater foreign aid resources conditional on anti-corruption improvements, yet these projects have not made significant headway in combatting corruption.[85]

None of this is to say that a large investment award against a state would not affect government decision-making at the margin.[86] While governments are not profit-maximizing, they are not immune to fiscal constraints either. It is simply a far more attenuated and indirect process than with corporations.[87] Where corporations respond directly to monetary awards, governments only respond to financial losses to the extent that those costs are translated into political costs.[88]

Given this analysis, how would the removal of the corruption defense influence governments' actions to address corruption? The strong version of the anti-corruption defense argument—that investment awards will lead to a robust anti-corruption response as governments internalize the costs of corruption—is almost certainly not correct. Unlike corporations, government support does not rise and fall based on fiscal inflows and

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81. Governments targeted by foreign sanctions can (counter-intuitively) experience an increase in domestic support through "rally around the flag" effects. *See* Risa A. Brooks, *Sanctions and Regime Type: What Works, and When?*, SEC. STUD., Summer 2002, at 1, 34.

82. *See* Matthew Stephenson, *Honey and Poison: On Corruption*, LIBERTIES, Summer 2021.

83. *See id.* (discussing the lack of quick and sure solutions to solving corruption in many countries where corruption is prevalent).

84. *See* Susan Rose-Ackerman, *The Law and Economics of Bribery and Extortion*, 6 ANN. REV. L. & SOC. SCI. 217 (2010); Svensson, *supra* note 16.

85. M. G. Quibria, *Foreign Aid and Corruption: Anti-Corruption Strategies Need Greater Alignment with the Objective of Aid Effectiveness*, 18 GEO. J. INT'L AFFS. 10 (2017).

86. Frankel, *supra* note 66, at 1492.

87. *Id.* at 1484–85.

88. Levinson, *supra* note 66, at 347.

outflows, but instead on a much broader set of social and economic policies. In addition, the supporters of the government may not have to bear the costs of the judgment, unlike corporate shareholders. The threat of investment judgments may put the government deeper into debt—or increase the fiscal burdens on disfavored segments of the population—but it is unlikely to lead to significant reform absent a larger domestic crisis.[89]

The weaker version of the anti-corruption defense argument—the so-called "moral hazard problem"[90] where the existence of the defense gives governments an incentive to maintain corrupt practices as a means of defending against investment claims—is also unlikely to be true. This is because corruption creates both social and economic costs for governments. Corruption leads to lower economic growth, lower rates of innovation, less investment in fixed assets, and a host of other social concerns.[91] The issue is not that governments do not know that corruption is a problem (nor that they are complacent to live with it so long as they have a defense in investment arbitration). Rather, the issue is that the political structures, network relationships, and entrenched practices make corruption hard to reform.[92] Moreover, a government that is dedicated to addressing corruption is very unlikely to be deterred from pursuing reforms because of the availability of the corruption defense (which the government might not even claim so it can encourage more foreign investment).

Both the stronger and the weaker versions of this argument also ignore the broader transnational anti-corruption legal regime: laws addressing the supply side of bribery may indirectly pressure a government to address corruption at home. While supply side regulations such as the FCPA and the U.K. Bribery Act do not formally cover governments, these laws certainly affect governments' ability to attract foreign investment.[93] MNCs' investment decisions are sensitive to the existence of anti-corruption law. In response to the United States' more robust enforcement of foreign anti-bribery laws in the mid-2000s, both American and non-American firms covered by the FCPA decreased their exposure to the law by scaling back their investment in countries with high corruption risks.[94] Similarly, another study shows that American firms already covered by the FCPA further decreased their investment in countries with high corruption risk when the

89. *See* Rachel Brewster & Andres Ortiz, *Never Waste a Crisis: Anticorruption Reforms in South America*, 60 VA. J. INT'L L. 531 (2020) (highlighting that the existence of a domestic crisis is critical for the adoption of anti-corruption reform).

90. Llamzon, *State Responsibility*, *supra* note 8 (discussing the moral hazard of allowing host states to claim corruption includes not motivating the state to change its practices).

91. Svensson, *supra* note 16.

92. Rose-Ackerman, *supra* note 84, at 217.

93. Christensen et al., *supra* note 43, at 189–91.

94. *Id.*

U.K. introduced its own anti-corruption law, the U.K. Bribery Act.[95] These studies suggest that firms are responsive to the possibility of liability under foreign anti-bribery laws and alter their behavior to avoid exposure to corruption.

Consequently, to the extent government leaders are responsive to economic incentives, these foreign bribery laws already give government leaders a powerful motive to engage in anti-corruption reform to attract foreign investment independent of investment treaties.[96] Unlike adverse arbitral judgments, the prospect of greater investment might more readily translate into political gains. We could imagine that governmental elites might be motivated to attract foreign investment because it brings returns to their private holdings as well as the possibility of growth to the state, which often aligns with government officials' electoral incentives. As such, these robust extraterritorial foreign anti-bribery laws, which exist separately from investment law, provide a counterbalance to any moral hazard concern. Thus, the moral hazard concern that states will seek to retain corrupt practices to win investment law claims only appears significant when we view international investment law in isolation, sealed off from the other transnational economic law mechanisms. On balance, the corruption defense is unlikely to make government elites wish to maintain corrupt practices, given the weight of the incentives provided by supply side rules, such as the FCPA and U.K. Bribery Act. As mentioned earlier, it may even make host state leaders unwilling to invoke the corruption defense when the investor has engaged in corrupt practices.

In sum, there is little reason to believe that the corruption defense will make a significant policy difference in host states. While investment arbitral awards can impose significant financial difficulty on the state, they are not clear paths to anti-corruption reform. More broadly, this is an example of how investment treaties are not good policy tools for improving governance in host states. While it is tempting to believe that arbitral judgments will change domestic political systems for the better, recent scholarship demonstrates that investment law does not impact domestic governance, but rather its impact is isolated to the arbitral process.[97] This Essay is consistent

95. Sanseverino, *supra* note 38.

96. There are, of course, many reasons to think that government leaders are not responsive to arbitral awards or attracting investment. *See supra* Section II.B. For a discussion of why claims that competition among countries to attract mobile investment will not constrain state corruption or otherwise lead to pro-business policies, see Hongbin Cai & Daniel Treisman, *Does Competition for Capital Discipline Governments? Decentralization, Globalization, and Public Policy*, 95 AM. ECON. REV. 817 (2005).

97. *See, e.g.*, Jonathan Bonnitcha & Zoe Phillips Williams, *The Impact of Investment Treaties on Domestic Governance in Developing Countries*, LAW & POL'Y (forthcoming 2024) (reviewing the literature and discussing how international investment law is decoupled from investment reform).

with the view that international investment law is unlikely to lead to changes in national governance systems.

However, this does not mean there are not significant costs to eliminating the corruption defense. Arbitral awards are, indeed, very important to the individuals who will ultimately be responsible for paying these debts—the population of the state. If arbitral panels eliminate the corruption defense and begin awarding monetary judgments to investors who have engaged in corruption in the state, it is countries' citizens, not their government leaders, who will have to pay to compensate corrupt investors. The award's financial burden will lead to higher taxes, lower government services, higher national debt, or some combination of these three. As a result, the state's population pays the costs of corruption repeated—from the economic losses from the initial corruption[98] and when compensating the corrupt investor for their losses. As the arbitrators in the *World Duty Free* award stated, "[t]he answer, as regards public policy, is that the law protects not the litigating parties but the public; or in this case, the mass of tax-payers and other citizens making up one of the poorest countries in the world."[99]

D. The Corruption Defense and Firms' Incentives

If investment arbitral awards are unlikely to motivate governments to adopt significant anti-corruption measures, what about the firms that are supplying these bribes? Are they more likely to refrain from corruption in their investment decisions based on the existence of a corruption defense?

The relevant issue here is whether firms are also significantly deterred by the loss of investment protections if they engage in corruption, and, therefore, are less likely to engage in corruption as a result. The answer is almost certainly no for firms covered by the FCPA or the U.K. Bribery Act.[100] This is because the threat of prosecution under these laws is already a significant deterrent for corporations.[101] Under the FCPA and U.K. Bribery Act, firms face millions of dollars in penalties for overseas corruption and key corporate executives could face possible individual prosecutions and incarceration.[102] The loss of investment protections is unlikely to make a meaningful addition to the firm's calculations when deciding to engage in corrupt behavior with a foreign government

98. *See infra* Part III.

99. World Duty Free Co. v. Republic of Kenya, ICSID Case No. ARB/00/7, Award, ¶ 181 (Oct. 4, 2006), 46 I.L.M. 339, 369 (2007).

100. In addition to the United States and the U.K., other states, including Germany and Switzerland, are also strong enforcers of foreign anti-bribery law, although their jurisdictional scope tends to be narrower.

101. Sanseverino, *supra* note 38.

102. *Id.*

official.[103] Consequently, the existence of a corruption defense is unlikely to motivate these actors to enact further anti-corruption measures.

However, the situation may be different for firms not covered by robustly enforced foreign anti-bribery laws (such as the FCPA or U.K. Bribery Act). Firms based in states lacking foreign anti-bribery laws (or where the state is a weak enforcer of these laws) and that do not fall under U.S. or U.K. foreign bribery jurisdiction[104] are unlikely to have engaged in extensive anti-bribery measures. Implementation of compliance programs can be expensive, and corporations generally do not take on these costs without the shadow of potential prosecution.[105] As a result, for these "uncovered" firms, the possibility that they may be deprived of investment protections in the future based on their corrupt practices could substantially influence their investment behavior. At the very least, the firm's expected benefit from the investment will be lower if the firm knows its investment will not be protected by the relevant investment treaty in the event credible allegations of corruption are discovered.

This could affect the uncovered firm's behavior in two ways. First, the firm could decide against an investment in the relevant state. Second, the firm could engage in more anti-bribery measures to ensure it can take advantage of the relevant investment protections in future disputes with the state. We should expect that a firm interested in maximizing its profits will engage in anti-bribery actions up to the value it places on maintaining investment protection.

Here, we expect that uncovered firms might be deterred from some corrupt activities by the potential loss of investment protections. In this situation, the existence of the corruption defense can enhance corporate anti-corruption efforts by imposing costs on transnational firms that are otherwise not covered by robust foreign anti-bribery rules. From a policy perspective, this is a positive development. Moreover, it is unlikely to come at the cost of disincentivizing governments from engaging in anti-corruption efforts. For uncovered firms, the existence of the corruption defense is likely to produce less supply side corruption.

In sum, the existence of the corruption defense is a net positive for the goal of decreasing supply-side bribery from firms. Firms are far more

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103. If this analysis is incorrect, and firms covered by the FCPA/Bribery Act are motivated by the potential loss of investment protections to engage in additional anti-corruption measures, then this is yet another reason to maintain the corruption defense.

104. For instance, a firm that does not list shares on an American exchange or does not engage in commerce in the U.K. can often escape the jurisdiction of the FCPA and Bribery Act.

105. *See* Kevin E. Davis & Veronica Root Martinez, *Transnational Anti-Bribery Law*, *in* THE CAMBRIDGE HANDBOOK OF COMPLIANCE 924 (Benjamin van Rooij & D. Daniel Sokol eds., 2021). The costs of violating the FCPA or the U.K. Bribery Act are significant. *See* Brewster, *supra* note 37, at 1650–55; Stephen J. Choi & Kevin E. Davis, *Foreign Affairs and Enforcement of the Foreign Corrupt Practices Act*, 11 J. EMPIRICAL LEGAL STUD. 409 (2014).

responsive to monetary incentives than governments and the corruption defense can motivate firms to adopt more anti-corruption measures. For covered firms, the corruption defense is unlikely to have much of an effect given the robust penalties from FCPA or Bribery Act violations. However, for uncovered firms, the corruption defense is important because corruption actions will result in the loss of investment protections and, thereby, decrease the expected value of corruption investments.

III. THE IMPACT OF CORRUPT INVESTMENT ON HOST STATES

This Part turns to the second major question issue of this Essay: whether corrupt foreign investment systematically improves host states' economic and political development to a sufficient degree to warrant investment protections. This Part reviews the economic rationale normally attributed to investment treaties and then analyzes the differences between corrupt and clean investment on the host state's economic and political growth. Drawing on research from economics and international development studies, this Part explores the detrimental effects of corruption both economically and politically.

A. The Economic and Political Effects of Corrupt Investment

A major critique of the corruption defense is that any foreign investment, corrupt or clean, provides economic growth to host countries, particularly developing countries.[106] Given that investment has a beneficial impact on the national economy, commentators argue that foreign investment should be given treaty protections even if investors engaged in corruption during the investment process.[107] The logic is that investment treaties represent a bargain between investors and foreign governments through which investors provide fresh capital to host states, and host states accept limits on their national legislative and regulatory regimes in return.[108] Supporters of investment treaties highlight that this can persuade risk-adverse investors to increase their investments, which then lead to significant economic growth, improved employment opportunities, and greater tax revenue in the host country.[109] Critics of the corruption defense argue that corrupt investment

106. LLAMZON, CORRUPTION IN INTERNATIONAL INVESTMENT ARBITRATION, *supra* note 8, ¶ 1.23; Meshel, *supra* note 8, at 280.

107. *See* Llamzon, *Control of Corruption*, *supra* note 8, at 208–09.

108. *See id.*; *see also* LLAMZON, CORRUPTION IN INTERNATIONAL INVESTMENT ARBITRATION, *supra* note 8, ¶ 1.23.

109. Meshel, *supra* note 8, at 280 ("[F]oreign investment has been shown to contribute to developing economies in numerous ways, including 'employment and wage generation, tax revenues, export generation and capital formation.'"); *see also* Llamzon, *Control of Corruption*, *supra* note 8, at

can still lead to economic benefits for the host countries and thus should benefit from this bargain just as clean investment does.[110]

Others have questioned whether investment treaties do in fact lead to greater foreign investment,[111] but this Part is interested in exploring whether *all types* of foreign investment lead to economic gains. The conventional wisdom in investment law that all foreign investment leads to economic growth and other benefits to the national and local economy (and is thus deserving of treaty protection) is based on an assumption that there is not a fundamental difference between corrupt and clean foreign investment.[112] This approach treats foreign investment in a homogenous manner and fails to consider whether corrupt foreign investment fails to deliver the same benefits of clean foreign investment, or, worse, may actually decrease the economic benefits for the host state. Additionally, corrupt and clean foreign investment may be competing for infrastructure and concession contracts. As a consequence, corrupt investment, with its willingness to offer bribes, may crowd out clean investment, which often offer higher economic and social benefits.[113]

Economists regularly and consistently argue that corruption is detrimental to economic growth, particularly the type of "grand corruption" that is common when large foreign investment enters a national market through bids on infrastructure projects or concession contracts.[114] This type of corruption at the conception of the investment can be detrimental to the host state's economic growth through several mechanisms.

First, bribery distorts government spending. The possibility of obtaining the large corrupt payments that often attend foreign investment in government procurement projects can direct government spending toward projects that offer bribes and away from more socially and economically

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208–09 (highlighting that foreign investment "contribut[es] directly to the host state's economy in terms of job creation and measurable benefits to the general public").

110. Meshel, *supra* note 8, at 279–80; Llamzon, *Control of Corruption*, *supra* note 8, at 208–09.

111. *See* sources cited *supra* note 42.

112. *See, e.g.*, Meshel, *supra* note 8 (treating all foreign investment as equal); Llamzon, *Control of Corruption*, *supra* note 8 (same); Habazin, *supra* note 8 (same).

113. *See infra* notes 115, 128 & 131 and accompanying text.

114. Emmanuelle Auriol, *Corruption in Procurement and Public Purchase*, 24 INT'L J. INDUS. ORG. 867, 868 (2006); Roberto Burguet & Yeon-Koo Che, *Competitive Procurement with Corruption*, 35 RAND J. ECON. 50, 52 (2004); *see also* Charles Kenny & Tina Søreide, *Grand Corruption in Utilities* (World Bank, Policy Research Working Paper No. 4805, 2008) (discussing how corruption in the utilities sector can lead to higher electricity prices). More broadly, corruption has a negative impact on economic growth. Economists have also demonstrated that "greasing the wheels" (that is, corruption where local or foreign businesses pay officials to ignore regulators or "red tape") does not produce economic gains. Rather, corruption in government procurement, government contracting, or avoiding government regulation lowers economic growth—supporting a "sand in the wheels" theory. *See* Pierre-Guillaume Méon & Khalid Sekkat, *Does Corruption Grease or Sand the Wheels of Growth?*, 122 PUB. CHOICE 69 (2005).

advantageous projects.[115] Government officials may choose to spend government funds on one or two large infrastructure projects rather than multiple smaller projects in anticipation of the hundreds of millions in bribes that accompany such projects.[116] The bribes, rather than the need for the project, can drive government policy—and corrupt foreign investors are often quite willing to deliver on that promise of multimillion dollar bribe payments.[117] For instance, British Aerospace's history of creating foreign government demand for military aircraft by offering hundreds of millions of pounds in bribes has been well-documented.[118] Thus, even before the creation of the contract, corrupt investment can harm the state's trajectory for economic growth. Even if the project performs well, it can still represent a net economic loss for the host state because those state resources could have been put to a use with greater general welfare benefits but for the distortion created by bribes. Investors who claim that they are bringing economic benefit to states, notwithstanding their initial corruption, fail to recognize these dead-weight losses.

Second, the corrupt foreign investment can lead government officials to award government procurement or concession contracts based on the highest bribe payer rather than the quality of the work and the cost.[119] This leads to some very significant economic costs for the state as private payments, not economic factors, drive the selection of contracting partners. For concession contracts, the government may fail to extract true economic value of the concession in exchange for bribes.[120] The issues in public

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115. PAOLO MAURO, INT'L MONETARY FUND, WHY WORRY ABOUT CORRUPTION? 7 (1997), https://www.imf.org/EXTERNAL/PUBS/FT/ISSUES6/issue6.pdf [https://perma.cc/C9G4-Y3EY] ("Corruption may tempt government officials to choose government expenditures less on the basis of public welfare than on the opportunity they provide for extorting bribes."); Susan Rose-Ackerman, *"Grand" Corruption and the Ethics of Global Business*, 26 J. BANKING & FIN. 1889, 1892 (2002) ("[I]f kickbacks are easier to obtain on capital investments and input purchases than on labor, rulers will favor capital-intensive projects irrespective of their economic justification.").

116. MAURO, *supra* note 115, at 7 ("Large projects whose exact value is difficult to monitor may present lucrative opportunities for corruption. A priori, one might expect that it is easier to collect substantial bribes on large infrastructure projects or high-technology defense systems than on textbooks or teachers' salaries."); Rose-Ackerman, *supra* note 115, at 1892–93 (noting that corrupt government officials will frequently support large "white elephant" projects that are expensive but fail to promote development).

117. *See* Llamzon, *State Responsibility*, *supra* note 8 (stating that a large bribe "is not unusual" in high-value government contracting).

118. *See* David Leigh & Rob Evans, *The BAE Files: The Ray Brown Years*, GUARDIAN (June 8, 2007, 6:19 PM), https://www.theguardian.com/world/2007/jun/08/bae38 [https://perma.cc/84GS-7LD9].

119. Auriol, *supra* note 114, at 867–68 (highlighting the dead-weight costs of bribes in public procurement).

120. Rose-Ackerman, *supra* note 115, at 1894 (noting that corruption leads the state to receive too little from concession contracts). A concession contract is a contract where the state offers a private firm the rights to rent or exploit a state asset (often land), such as the rights to mine for minerals or extract

procurement are even larger.[121] The population may receive much lower quality public services in the form of energy networks or public infrastructure while paying more for it.[122] Here, the government is not selecting the most efficient firm but instead the one that is willing to make the largest corrupt payments. This results in dead-weight loss for the state both at the front end of the contract—where the country is overpaying for the services through corruption—as well as at the back end of the contract, where the country receives lower quality goods and services.[123] Particularly for large scale public procurement contracts, corruption investment can lead to poor infrastructure in energy, health, or transportation industries that hold back the country's economic growth.[124]

Third, corrupt investment can entrench corrupt local or national practices. Investors who are willing to pay bribes to make initial investments in countries contribute and reinforce local corrupt practices.[125] These investors funnel resources to corrupt elites, providing them with the resources to stay in power and resist reforms.[126] While opponents of the corruption defense argue that imposing large awards on the host state would prompt reform, they often ignore how the payments by corrupt investors *directly to government officials* provide a strong incentive for these government officials to oppose such reforms (while arbitral awards are paid

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oil or natural gas. In these situations, the government official might give the concession contract to the firm that is offering the largest bribe rather than offering the highest price. For a discussion of how corruption in concession contracts for lumber can additionally lead to environmental degradation through over-logging and flouting environmentally sensitive logging requirements, see Gregory S. Amacher, Markku Ollikainen & Erkki Koskela, *Corruption and Forest Concessions*, 63 J. ENV'T ECON. & MGMT. 92 (2012).

121. Public procurement is the purchase by governments or state-owned enterprises of goods or services for the public, such as a government hiring a private company to build a road or to offer publicly available medical care. Public procurement makes up a large part of government spending. For instance, OECD countries spend 29% of total government spending on public procurement projects. *See* OECD, PREVENTING CORRUPTION IN PUBLIC PROCUREMENT (2016), www.oecd.org/gov/ethics/Corruption-Public-Procurement-Brochure.pdf [https://perma.cc/JB2A-P8S7].

122. MAURO, *supra* note 115, at 7, 11; *see also* Rose-Ackerman, *supra* note 115, at 1894 (describing the effects of corruption on public procurement as "[t]he state pay[ing] too much for large-scale procurements" and "[g]overnment produc[ing] too many of the wrong kind of projects and overspend[ing] even on the projects that are fundamentally sound").

123. MAURO, *supra* note 115, at 7, 11.

124. *Id.*; *see also* Robert Gillanders, *Corruption and Infrastructure at the Country and Regional Level*, 50 J. DEV. STUD. 803, 803 (2014) (noting that corruption and poor infrastructure are two of the largest problems facing developing countries and that corruption is a determining factor in the country's level of infrastructure).

125. John M. Luiz & Callum Stewart, *Corruption, South African Multinational Enterprises and Institutions in Africa*, 124 J. BUS. ETHICS 383, 396 (2014) (discussing how MNCs' corruption "further entrenches or 'institutionalises' corruption" and how MNCs undervalue how their actions have an "impact on institutional evolution").

126. *See* Jong-sung You & Sanjeev Khagram, *A Comparative Study of Inequality and Corruption*, 70 AM. SOCIO. REV. 136, 153 (2005) (discussing how corruption produces greater wealth for elites, which then allows those elites to perpetuate inequality and high levels of corruption in "vicious circles").

by the state at large).[127] Thus the willingness of corrupt investors to provide direct private payments to government officials—who arbitration panels do not have a symmetrical ability to punish—means that the promise of future bribes may entrench corrupt practices notwithstanding the threat of arbitral judgments.

Finally, corrupt foreign investment can crowd out clean foreign investment, which could bring larger gains to the state.[128] Often foreign investors who are willing to pay bribes are in competition with investors who are unwilling to pay bribes (for ethical or legal reasons) for the same government procurement projects or concession contracts.[129] Clean investors will often lose these contests,[130] depriving the host state of greater economic and political gains. And there is growing evidence that clean foreign investment produces greater economic growth for the local economy and can have stronger multiplier effects for the local economy. For instance, Christensen, Maffett, and Rauter studied resource-extractive investment in Africa made by companies covered by the FCPA and those that were not.[131] The authors found communities within a 10-kilometer radius from an extraction investment that was covered by the FCPA experienced a 22% increase in wages and a 40% increase in local economic activity compared to similar extractive investments not covered by the FCPA.[132] Using FCPA coverage as a signal that the investors were unlikely to engage in bribery, the authors concluded that clean investment led to greater economic gains for host states.[133] Clean investors can also shift economic power and resources away from corrupt officials by demanding cleaner government processes. The Christensen, Maffett, and Rauter research further found that local communities near an FCPA-covered extractive investment experienced an 8% decrease in the perception of

127. HOWARD WHITTON, CHR. MICHELSEN INST., TEACHING ETHICS IN HIGHLY CORRUPT SOCIETIES: CONCERNS AND OPPORTUNITIES 2 (2009), https://www.cmi.no/publications/file/3345-teaching-ethics-in-highly-corrupt-societies.pdf [https://perma.cc/E2G3-6UEK] (highlighting that corrupt political elites "resist reforms that would restrict their rent-seeking activities in corrupted public institutions and governmental processes"); Michael Johnston, *Public Officials, Private Interests, and Sustainable Democracy: When Politics and Corruption Meet*, *in* CORRUPTION AND THE GLOBAL ECONOMY 61, 80 (Kimberly Ann Elliot ed., 1997) ("[C]orruption creates formidable incentives for powerful people and groups to resist reform.").

128. Kjetil Bjorvatn & Tina Søreide, *Corruption and Competition for Resources*, 21 INT'L TAX PUB. FIN. 997, 997–1001 (2014) (highlighting the competition between investors who are willing to pay bribes and investors who are not in government procurement projects and concession contracts).

129. *Id.* at 999.

130. *Id.* at 997–1001.

131. Hans B. Christensen, Mark Maffett & Thomas Rauter, *Reversing the Resource Curse: Foreign Corruption Regulation and the Local Economic Benefits of Resource Extraction* (U. Chi. Becker Friedman Inst., Working Paper No. 2020-155, 2022).

132. *Id.*

133. *Id.*

corruption.[134] If local perceptions are accurate, their research suggests that investors who resist bribes can change the institutional trajectory of some government processes away from corrupt practices.[135]

B. Application to Investment Law

These fundamental differences should make investment arbitration panels skeptical of the supposed economic gains that corrupt investors bring to host states. While some commentators worry that the existence of a corruption defense "would likely result in unfinished or mal-maintained projects and act against the interests of host state's citizens,"[136] that analysis ignores how much corrupt investment can stack the deck against the host state's citizens from the start. The existence of corruption in the infrastructure sector is a major cause of unfinished and poorly maintained projects,[137] so we should be skeptical that protecting corrupt investors will help improve these issues.

Llamzon puts the question quite starkly when he asks whether a large foreign investment, such as building a power plant in a developing country, should be denied investment treaty protections because it is tainted by bribes paid to public officials at multiple levels of government—even if the project directly contributes to the local economy in terms of job creation and other measurable benefits.[138] His answer is that international commerce is messy, so investment panels should keep jurisdiction and engage in a fault apportionment analysis.[139] Given the effects of corrupt investment on host states, this Essay argues that investment panels are justified in maintaining their current stand that they should not have jurisdiction over these cases.[140]

Reconsidering Llamzon's hypothetical, it is unclear if the power plant has brought significant economic benefits to the state and whether it is, therefore, worthy of protection. First, the state's desire to build the power plant may have been driven more by the government officials' desire to benefit from the bribes that the corrupt investor was willing to provide than by the country's actual need for an additional power plant. The corrupt investor may have siphoned funds away from areas of great need, such as health care or education, with its capacity and willingness to offer large

134. *Id.*

135. *Id.*; *see also* Luiz & Stewart, *supra* note 125, at 396 (discussing the potential for firm's clean practices to impact the evolution of governmental institutions away from corruption).

136. Llamzon, *Control of Corruption*, *supra* note 8, at 211.

137. JILL WELLS, CHR. MICHELSEN INST., CORRUPTION IN THE CONSTRUCTION OF PUBLIC INFRASTRUCTURE 8 (2015), https://www.u4.no/publications/corruption-in-the-construction-of-public-infrastructure-critical-issues-in-project-preparation-1.pdf [https://perma.cc/HL38-H2SH].

138. Llamzon, *Control of Corruption*, *supra* note 8, at 208–09.

139. Llamzon, *State Responsibility*, *supra* note 8.

140. *See supra* Section III.A.

private payments to local elites. In addition, even if the state did need a new power plant, the corrupt investor was most likely not the most efficient firm that could have provided such a plant. The corrupt investor most likely beat out other firms who were not offering bribes but rather higher quality infrastructure at a better price. Again, the citizens of the state are hurt by this investment. Accepting the hypothetical's assumption that the investor did offer some jobs and economic benefits, other investors would have been able to offer a better product and greater economic benefits but for being crowded out by the bribe-paying investor. Thus, the corrupt investor's ability to show that its investments produced some economic gains does not mean that the state was not significantly harmed due to this investor's corruption. The state might have received greater economic and general welfare gains from clean investment. Finally, the bribe-paying investor helped to entrench the corrupt elites that it is now litigating against by providing them resources.

Given these effects, investment panels are justified in excluding investments that were conceived by corrupt means from investment protections. Although investment panels have not based their analyses on the fundamental difference between corrupt and non-corrupt foreign investment (rather basing their judgments on public policy or the treaty's jurisdictional limits[141]), the fundamental differences between corrupt and non-corrupt investment on host states' economic and political development should be an important consideration in justifying different treatment of corrupt investment.

IV. THE SCOPE AND DESIGN OF INVESTMENT TREATIES

This Part turns to the final question of whether governments, in forming investment law treaties, want to provide investment protections for corrupt investment. This Part begins by discussing how the jurisdictional bar to arbitrating investment claims that involve corruption is supported by the language of most investment treaties. This Part reviews the terms of investment treaties, most of which have limited scopes that provide a strong jurisdictional basis for excluding corrupt investment: the requirement that investment be in accordance with the laws of the host state.

This Part then turns to recent events: that governments negotiating new BITs seem to agree that corrupt investment should be even more explicitly excluded and, thus, endorse the invocation of the corruption defense. Investors' home governments are certainly in a good position to defend their nationals from the invocation of a corruption defense by updating their

141. *See* discussion *infra* Part IV.

investment treaty if the capital-exporting governments believe the defense was unfair or bad policy. However, governments have not sought to protect corrupt investors. Quite the opposite, some investors' home states are even moving to clarify that corrupt investments should not receive treaty protections. Most states do not regularly renegotiate investment treaties, although they do update their "model BIT," which serves as a template for any new investment treaty negotiations. Instead of curbing the jurisdictional bar to arbitration in cases of corrupt investment, governments in both capital-exporting and capital-importing countries are updating their model BITs to make the exclusion of corrupt investment even more explicit. This indicates that even the investors' home governments support the corruption defense and view it as good public policy.

Investment arbitration is based on treaty law, and the treaties establish when investment panels have jurisdiction to hear claims by investors. States are interested in encouraging investments that would be beneficial to the state but not those that would undermine its laws. As a result, most treaties include a legality clause that only extends investment protections to the investment that conforms with the state's laws.[142] Clara Reichenbach finds that nearly two-thirds of all BITs have legality clauses requiring investors to act in accordance with the laws of the host state.[143] While some commentators have argued that the broad interpretation of legality clauses could bar treaty protections for minor violations and formalities,[144] this is not the case where corruption is alleged.[145] Anti-corruption laws are important public policies, not formalities, and exclusions of investment on these grounds is consistent with bilateral investment treaties' terms.

While investment treaties have been generally uniform in applying a jurisdictional bar to hearing investment cases involving corruption when the treaty has an explicit legality clause,[146] critiques of the bar often maintain this is "unfair" given that both government officials and investors have engaged in illegal activity.[147] Part of this unfairness claim is that this regime

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142. For an excellent analysis of the text of investment treaties dealing with corruption, see Reichenbach, *supra* note 10.

143. *Id.* ¶ 21.06 ("65.5 per cent of the 2,538 BITs signed between 1959 and 2016 contain an explicit legality clause.").

144. *Id.* ¶ 21.11.

145. *See* Gabriel Bottini, *Legality of Investments Under ICSID Jurisprudence*, *in* THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY 297, 297–300 (Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Chung & Claire Balchin eds., 2010). *But see* Zachary Douglas, *The Plea of Illegality in Investment Treaty Arbitration*, 29 ICSID REV. 155 (2014) (stating that illegality applies to form of investment, not the process by which it was made); Kryvoi, *supra* note 9, at 583–84 (same). For a discussion of these issues, see Reichenbach, *supra* note 10, ¶ 21.12.

146. Reichenbach, *supra* note 10, ¶ 21.04.

147. Llamzon, *State Responsibility*, *supra* note 8 (discussing the unfairness of legality clauses to investors and citing John R. Crook, *Remedies for Corruption*, 9 WORLD ARB. & MEDIATION REV. 303, 311 (2015)).

does not provide good incentives, but it is also broader: that government officials and investors have engaged in similar activity and thus governments and investors should not be treated differently by an arbitration panel.[148] However, this misunderstands the discretion that states have to craft treaties that only offer private investors limited remedies. Countries are free to craft treaty terms that exclude private investors from the treaty's benefits, particularly when there is a strong public policy rationale for doing so. In these situations, investors may not like the treaty language, but it is not unfair for the treaty to be designed (by both the home and host states) only to protect non-corrupt investment.

Investment law commentators have additionally maintained that the current approach of investment treaties to prohibit the protection of corrupt investment is undesirable because it establishes an asymmetric treatment of investors and governments.[149] However, most of investment law treats investors and states asymmetrically—to the investors' advantage. Investment arbitration famously only allows investors—but not states—to initiate arbitration.[150] If investors fail to meet their parts of concession agreements or public procurement contracts, investment treaties do not provide a means to states to require investors to arbitrate these disputes.[151] Consequently, asymmetrical treatment that advantages governments rather than investors should not viewed as facially unfair but part of the nature of interstate treaty negotiation that provides governments and investors with a mix of differential treatment.

Even where the treaty does not contain a legality clause, arbitrators are justified in applying a jurisdictional bar. Many tribunals have done so using general principles of good faith or public policy.[152] Commentators agree that the goal of investment treaties is to encourage investment that will benefit the host state, and corrupt investment is unlikely to do so.[153] Various critics of the corruption defense argue that corrupt investment produces some economic gain (and thus should benefit from the treaty's protection),[154] but this approach presumes that the economic benefits of the foreign investment would not have been forthcoming but for that specific corrupt investor. But as the crowding out literature highlights, there are often multiple bidders for foreign investment projects, particularly government procurement and

148. *Id.* at 6 (demanding that both the government and the corporation be held accountable by the investment arbitration panel).

149. Yan, *supra* note 9, at 1005–08.

150. *See* Louis T. Wells, *Backlash to Investment Arbitration: Three Causes*, *in* THE BACKLASH AGAINST INVESTMENT ARBITRATION, *supra* note 145, at 341, 350–51 (discussing the asymmetry in investment practice).

151. *Id.*

152. Reichenbach, *supra* note 10, ¶ 21.30.

153. *See supra* Part III.

154. Llamzon, *State Responsibility*, *supra* note 8.

concession contracts where grand corruption is most common.[155] Other investors who did not engage in corruption could have also bid on those projects, and those investments could have produced equally good if not significantly better economic results.[156] There is a market for investment—investors bid for the procurement projects and concession contracts—and thus the fact that there were some benefits from the corruption-tainted investment does not mean that this investment should be protected by investment treaties.

Moreover, states are moving toward more restrictive investment protections in cases of corruption, not less. To the best of my knowledge, no states have updated the terms of their Model BIT to disallow the corruption defense or explicitly give the arbitral panel the jurisdictional power to hear these claims and assess relative fault. To the contrary, states—both capital-exporting and capital-importing—have more explicitly excluded corrupt investment from their investment treaty's protections. On the capital-exporting side, the Canada-E.U. Comprehensive Economic and Trade Agreement (CETA) includes such a clause in its investment chapter.[157] Specifically, the CETA investment agreement contains a legality clause that uses more explicit language than the "in accordance with local laws" formulation, and it explicitly bars arbitrators from hearing cases that involve investments made through corruption.[158] Similarly, the Netherlands's Model BIT and Norway's Model BIT now require that arbitration panels decline jurisdiction if the investment was made through corruption.[159] Given that these states are capital exporters and low-corruption states, we might expect that they are primarily concerned with the welfare of their foreign investors (rather than expecting to use the corruption defense themselves). The fact that these states are embracing explicit carve-outs for investment made through corruption indicates that they do not consider it to be unfair for their own investors to be denied the benefits of investment protections if the investor engages in corruption.

Capital-importing states are also adopting more restrictive legality provisions. For example, India's Model BIT denies investors the right to arbitrate claims when the investment was made through corrupt means.[160] In addition, the Southern African Development Community Model BIT and the Morocco-Nigeria BIT make explicit that investment tainted by

155. Bjorvatn & Søreide, *supra* note 128, at 997–1001.
156. *See* Christensen et al., *supra* note 131.
157. Yan, *supra* note 9, at 1001.
158. *Id.*
159. *Id.* at 1001–02.
160. *Id.* at 1001; Mbiyavanga, *supra* note 27, at 145.

corruption, at the start of the investment or afterwards, is a violation of local laws and should preclude the investor from investment treaty protections.[161]

The clear trend among states negotiating investment treaties has been relative support for the corruption defense. Some states have more overtly included this doctrine in their investment agreements and no state has disclaimed it. The fact that both capital-exporting and capital-importing states have moved in this direction indicates that governments have considered the negative economic and political effects of corrupt investment, evaluated the public policy impacts of the corruption defense, and concluded the best public policy is to preclude them from investment protections.

As a concluding consideration, international investment law as a regime is unlikely to benefit if tribunals begin to reject the corruption defense. International investment law is already experiencing a legitimacy backlash on several scores, including its lack of transparency and its substantive overreach into state policymaking prerogatives.[162] The investment regime's perceived legitimacy is unlikely to improve if private investors who have engaged in corruption in the host state are able to receive arbitral awards against the state notwithstanding their illegal behavior.[163] And awards based on corruption add to concerns that investment law is not sufficiently respective of states' public policy interests.[164] Without a jurisdictional bar to investment claims based on corruption, investors that act illegitimately within the host state—violating its domestic laws on an important public policy issue—could still receive multimillion dollar awards. *This effectively taxes the state's population with the costs of corruption twice*: once at the initiation of the investment and again in investment arbitration. Such awards are likely to exacerbate the public's legitimacy concerns about the substantive investment law, particularly if arbitrators ignore legality clauses to reach their results.

In sum, governments negotiating investment treaties do not appear to want to protect corrupt investment. Instead, governments have barred protection through legality clauses and, increasingly, through explicit prohibitions. Notably, no government has revised its investment treaties to

161. Yan, *supra* note 9, at 1009; Mbiyavanga, *supra* note 27, at 143–44; Reichenbach, *supra* note 10, ¶¶ 21.14–.15 (citing the Morocco-Nigeria BIT and the Iran-Slovakia BIT).

162. *See, e.g.*, THE BACKLASH AGAINST INVESTMENT ARBITRATION, *supra* note 145; Langford et al., *supra* note 45; Shuping Li & Wei Shen, *Legitimacy Crisis and the ISDS Reform in a Political Economy Context*, 15 J. E. ASIA & INT'L L. 31, 32 (2022).

163. *See, e.g.*, Bottini, *supra* note 145, at 297 (arguing that the exclusion of corruption investment from investment protection is necessary to "strengthen the legitimacy" of investment law); Wells, *supra* note 150, at 347–48 (identifying investment law's failure to acknowledge investor corruption as a major source of the legitimacy crisis facing the regime).

164. Wells, *supra* note 150, at 347–48.

permit the protection of corrupt investment. This reflects governments' judgments that the corruption defense provides the best policy balance.

CONCLUSION

This Essay concludes by addressing concerns about the demand side of corruption. For investment law, the corruption has already occurred by the time that an investment arbitration panel is hearing a dispute, so the question is about how to distribute the costs of these criminal actions and what the best policy is for incenting the relevant actor's behavior going forward. This Essay argues that the current policy strikes the best balance, but it leaves important questions about accountability for the government officials that received bribes.[165] Investment panels do not have jurisdiction over corrupt government officials, so it is difficult for investment arbitration panels to influence their policy choices. However, these government officials are a major part of the corruption problem, so it is unsatisfying to not address them as well. The question is whether this is best done inside or outside of investment law arbitration.

The challenges of creating accountability for government officials who remain popular with national or regional electorates, even after engaging in illegal activity, are significant for developing and developed countries alike.[166] There are few easy answers on this score, as governments are very different organizations than corporations, and there are few sure mechanisms to improve corrupt government practices.[167] Matthew Stephenson argues that domestic anti-corruption reform is best thought of as "a Long Slow Slog" where progress is slow, backsliding is common, and gains are incremental.[168]

But there are mechanisms to try to pursue government officials who are willing to abuse their public power to either receive bribes in exchange for

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165. *See* Andrew Brady Spalding, *Deconstructing* Duty Free*: Investor-State Arbitration as Private Anti-Bribery Enforcement*, 49 U.C. DAVIS L. REV. 443 (2015) (focusing on the need for accountability for corrupt government officials); Paul D. Carrington, *Enforcing International Corrupt Practices Law*, 32 MICH. J. INT'L L. 129 (2010) (same).

166. This is an issue that even the United States is grappling with. *See, e.g.*, Jack Goldsmith, *Prosecute Trump? Put Yourself in Merrick Garland's Shoes*, N.Y. TIMES (June 20, 2022), https://www.nytimes.com/2022/06/20/opinion/trump-merrick-garland-january-6-committee.html [https://perma.cc/WT3Q-K32U] (questioning whether the DOJ should bring charges against a former president who maintains a solid base of support); Michael S. Schmidt & Maggie Haberman, *Despite Growing Evidence, a Prosecution of Trump Would Face Challenges*, N.Y. TIMES (June 18, 2022), https://www.nytimes.com/2022/06/18/us/politics/trump-jan-6-legal-defense.html [https://perma.cc/L4UT-ADPU] (discussing practical and political challenges of prosecuting a former president).

167. *See* Susan Rose-Ackerman, *International Actors and the Promises and Pitfalls of Anti-Corruption Reform*, 34 U. PA. J. INT'L L. 447, 451 (2013) (discussing a host of possible domestic anti-corruption reforms and assessing their likely positive and negative effects).

168. Stephenson, *supra* note 82.

favorable government action or embezzle from the government more generally. The key to these mechanisms is to specifically target the government officials themselves, not the broader population of the state or the government at large. By narrowly tailoring the sanctions to the individuals that are engaged in corruption, there are greater hopes of deterrence and, thereby, less corrupt behavior.

We most often think of criminal sanctions in this context, and some governments have been able to hold government officials criminally accountable for corruption. For instance, Malaysian prosecutors successfully convicted the former prime minister, Najib Razak, for corruption related to the 1MDB scandal.[169] However, even that success can demonstrate the limits of national efforts to hold government officials accountable. In the Najib case, Malaysian authorities alleged that the prime minister embezzled over $1 billion from the state but he was only convicted of stealing just under $10 million.[170] The lack of confidence in domestic legal systems' political will or capacity to prosecute corruption has led to calls for an International Anti-Corruption Court that could directly hold government officials criminal accountable for corrupt actions,[171] and there is some limited support for this proposal by the Dutch and Canadian governments.[172] While such a court is unlikely to become a reality soon, actions far less dramatic (or slow in developing) than an international criminal institution can potentially be effective.

Outside of the threat of jail time, one of the most effective tools to combat corruption can be the seizure of government officials' ill-gotten assets, either in their home jurisdictions or in foreign jurisdictions. Asset seizure, subject to due process protections, can be a powerful anti-corruption tool because it deprives the government officials of the gains from their illicit activity.[173] The purpose of the illegal activity is often to secure financial gains for oneself and one's family, and measures that

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169. Mercedes Ruehl, *Malaysia's Ex-PM Najib Fails in Final Bid to Avoid Jail over 1MDB Scandal*, FIN. TIMES (Aug. 23, 2022), https://www.ft.com/content/13252721-b23f-4e4d-b1cf-c739b4eb0022 [https://perma.cc/34E8-EM8K].

170. Adam Taylor, *Malaysian Ex-Premier Najib Loses Appeal, Begins 12-Year Sentence*, WASH. POST (Aug. 23, 2022, 1:41 PM), https://www.washingtonpost.com/world/2022/08/23/najib-razak-prison-1mdb-appeal-12-years/ [https://perma.cc/C34P-ATY3].

171. *See* WOLF, *supra* note 51 (for an outline of the proposal); STEPHENSON & SCHÜTTE, *supra* note 52 (for a review of the debate over the court).

172. Adam Taylor, *Ex-Leaders Call for Global Anti-Corruption Court to Tackle Putin, More*, WASH. POST (May 25, 2022, 12:52 PM), https://www.washingtonpost.com/world/2022/05/25/international-anti-corruption-court/ [https://perma.cc/Y5FD-GS3K].

173. Tommaso Trinchera, *Confiscation and Asset Recovery: Better Tools to Fight Bribery and Corruption Crime*, 31 CRIM. L.F. 49, 65–71 (2020) (discussing the potential deterrent effect of non-conviction-based asset forfeiture); Mat Tromme, *Waging War Against Corruption in Developing Countries: How Asset Recovery Can Be Compliant with the Rule of Law*, 29 DUKE J. COMPAR. & INT'L L. 165 (2019) (same).

destabilize the potential financial gains from bribery can decrease the expected benefits of engaging in corrupt behavior.

States and corporate leaders who are interested in bringing greater accountability to foreign government leaders can do more to lobby for and pass measures that provide for the confiscation of ill-gotten assets from foreign government leaders who move their corrupt assets to major capital markets, such as London, New York, or Zurich.[174] These "destination" states provide corrupt government leaders with a secure location outside of their home jurisdiction to hold their assets and, thus, can even increase foreign government officials' expected gains from corruption.[175] Several destination states, including the United States and the U.K., and "states of origin" (states who are requesting the return of assets) have previously held discussions about how better to address the assets of corrupt foreign officials,[176] but there is far more that could be done on that score. A full discussion of an asset seizure regime is beyond the scope of this Essay, but criminal prosecutions and asset seizures are more precise tools for achieving accountability given that they target the decision-maker, not the broader state.

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How should arbitral panels deal with investments tainted by corruption at their inception? Investment arbitrators generally find that they do not have the jurisdiction to adjudicate these cases. Recent scholarship has decried this "corruption defense," arguing that the practice unfairly harms investors and encourages governments to maintain corrupt practices. This Essay responds, arguing that the current approach is not only defensible on public policy grounds, but rather the best approach on balance. In doing so, this Essay has analyzed three core policy questions at the heart of the debate: Would the elimination of the corruption defense lead governments to adopt meaningful anti-corruption reform? Does corrupt foreign investment improve economic and political conditions in the host states to a sufficient degree to warrant investment protection? Do the governments who establish the investment treaties that set the contractual terms between states about foreign investment want investment protections for corrupt investment? The

174. For an excellent overview of asset recovery, see Radha Ivory, *Asset Recovery in Four Dimensions: Returning Wealth to Victim Countries as a Challenge for Global Governance*, *in* CHASING CRIMINAL MONEY: CHALLENGES AND PERSPECTIVES ON ASSET RECOVERY IN THE EU 175 (Katalin Ligeti & Michele Simonato eds., 2017).

175. *See* Cecily Rose, The Normative Development of International Asset Recovery Laws (unpublished manuscript) (on file with author) (discussing the treaty law and normative principles for the recovery of ill-gotten assets held by government officials abroad).

176. For a proposal for a transnational institution that could facilitate the asset return process between destination and origin states, see Laurence R. Helfer, Cecily Rose & Rachel Brewster, *Flexible Institution Building in the International Anti-Corruption Regime: Proposing a Transnational Asset Recovery Mechanism*, 117 AM. J. INT'L L. 559 (2023).

answers to all three questions support maintaining the status quo of barring investor recovery where corruption is involved in investment. In doing so, the Essay provides an important and necessary theoretical foundation for analyzing corruption issues going forward.